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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES SENATE, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether section 202(c) of the Natural Gas Policy Act of 1978 ("NGPA") violates Article I, Section 7 of the Constitution by establishing a procedure, other than the procedure for enactment of legislation, for legislative review of rules proposed pursuant to novel and experimental delegated authority.

2. Whether section 202(c) of the NGPA, which establishes a procedure for Legislative Branch review of legislative rules of an agency which is independent of presidential control, violates the principle of separation of powers by infringing on the power of the President under Article II to faithfully execute the laws or the power of the Judiciary under Article III to adjudicate cases or controversies.

3. Whether respondents have standing to challenge the constitutionality of section 202(c), where the inseverability of the legislative review procedure eliminates any statutory basis for the grant of relief by the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner United States Senate respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 29, 1982.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–104a)[1] is reported at 673 F.2d 425. The rule proposed by the Federal Energy Regulatory Commission ("FERC") in Order No. 80 (App. 123a–195a) is published at 45 Fed. Reg. 31622 (1980). The decision of the Federal Energy Regulatory Commission denying rehearing and revoking Order No. 80 (App. 196a–

[1] References to "Appendix" or "App." are to the Appendix to Jurisdictional Statement submitted April 29, 1982, by The Process Gas Consumers Group, et al., in a related case, No. 81-2008.

The other parties to the proceeding in the court of appeals are set forth at pages ii–iv of the Jurisdictional Statement of The Process Gas Consumers Group, No. 81-2008. The United States, the United States Senate, and the United States House of Representatives, which had appeared in the court of appeals as amici curiae, were granted leave to intervene after judgment (App. 105a).

203a) is reported at 45 Fed. Reg. 54741 (1980), and its decision denying rehearing of the revocation of Order No. 80 (App. 204a–207a) is reported at 45 Fed. Reg. 71780 (1980).

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1982 (App. 208a–209a). On March 10, 1982, the court of appeals denied the petition for rehearing filed by the American Gas Association (App. 210a). On May 13, 1982, the Chief Justice granted the application of the Senate for an extension of time to file a petition for certiorari, and ordered that the time for filing be extended to August 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Constitution and the Natural Gas Policy Act of 1978 are set forth in the Appendix (App. 222a–231a).

STATEMENT

After eighteen months of strenuous effort to resolve the enormously divisive and controversial issues created by the energy crisis, Congress enacted the Natural Gas Policy Act of 1978 ("NGPA") as part of a five-part package of energy legislation. In the years before the NGPA, severe supply shortages and high price increases for natural gas struck the economy with devastating force.[2] This impact compelled a legislative effort to increase the supply of gas, and to experiment with a novel scheme of regulation to distinguish between high- and low-priority users of natural gas.[3]

Of the NGPA's two key titles, Title I provides for gradually increasing wellhead natural gas prices and brings intrastate gas production under federal price regulation for the first time.

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[2] At the worst point, in February 1977, a combination of factors including a harsh winter produced natural gas supply shortages so severe that an estimated 1.2 million workers were idled. See Comptroller General, Natural Gas Plan Needed to Provide for High-Priority and Critical Uses 4 (1981).

[3] High-priority users include residential consumers and industries dependent on gas for use as the feedstock for chemical synthesis, and in other industrial processes. Low-priority users burn gas, instead of coal, as "boiler fuel" to generate steam or electricity.

Title II, 15 U.S.C. 3341–3348 (Supp. IV 1980), establishes a two-phase program for "incremental pricing." Under such pricing, all users of natural gas do not pay the same price. Instead, some industrial users pay a disproportionate share of the price increases, by paying a surcharge based on the "increment" of cost for tapping new sources of gas. Proponents of incremental pricing hoped that it would be a "market ordering" device, whereby industrial users would signal their displeasure with large price increases to encourage their pipeline suppliers to pay less for new sources of supply. Proponents of incremental pricing also hoped to shield residential and small commercial natural gas users from large price increases, by shifting part of the charge for such increases onto industrial users (App. 8a–9a and n. 10).

Because Congress was reluctant to proceed on a mandatory basis with full-scale incremental pricing, Title II of the NGPA divided incremental pricing into two phases. Section 201 of the NGPA directs the Federal Energy Regulatory Commission ("FERC") to establish a first phase ("Phase I"), under which an incremental pricing surcharge would be passed to low-priority industrial boiler fuel users. That phase, which was mandatory and certain, was to be implemented by November, 1979 without legislative review.

Section 202 of the NGPA creates the option of expanding incremental pricing to a second phase ("Phase II") in which incremental cost surcharges are also charged to high-priority industrial users. This two-phase structure reflected a key congressional distinction between low-priority boiler fuel use of natural gas, a "wasteful" use which Congress was determined to restrain in response to the energy crisis, and high-priority industrial gas uses, which Congress could not restrain without risk to the national economy.[4] The NGPA directed FERC to

[4] In a key early bill reported by the Senate Committee on Commerce, incremental pricing for boiler fuel use was intended "[a]s a complement to the mandatory boiler fuel use phaseout provision." S. Rep. No. 907, 94th Cong., 2d Sess. 16 (1976). This complementary arrangement was targeted at boiler fuel uses "to discourage such wasteful uses of natural gas. . . ." *Id.* at 29.

produce a "proposed" [5] Phase II amendment to the Phase I rule by May, 1980. Unlike Phase I, the Phase II proposal was to take effect only after it was transmitted to the House of Representatives and the Senate. If either House disapproved the proposal, then under Sections 202(a) and (c) of the NGPA, Phase II would not go into effect; only Phase I would remain in effect. Like many other legislative review mechanisms of the modern era,[6] the two-phase division of incremental pricing enabled Congress to delegate necessarily flexible and experimental authority, while insuring that the exercise of such authority would be accountable through democratic processes.

As required by the NGPA, in 1979 FERC established a Phase I rule for boiler fuel use of natural gas. However, various developments after adoption of the NGPA diminished the basis for expanding the Phase I rule to a second phase.[7] On March 20,

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[5] Section 202(a)(1) provides that "the Commission shall, by rule, prescribe an amendment to the rule required under Section 201. . . ." The sole legislative history explaining this language—the conference report on section 202—describes the Commission's promulgation as a proposal three times:

> The section provides a Congressional review mechanism by which either the Senate or the House of Representatives may adopt a resolution of disapproval of any amendment *proposed* by the Commission under this section. The amendment will take effect only if not disapproved by either House of the Congress within 30 calendar days of continuous session after it has been submitted. If the amendment required by sec. 202(a) is disapproved, after six months the Commission may submit additional *proposals*. Authority to submit *proposals* extends for a 2-year period beginning at the time of the adoption of the first disapproval resolution.

House Conference Rep. No. 1752, 95th Cong., 2d Sess. 96–97, *reprinted in* 1978 U.S. Code Cong. & Ad. News 8983, 9013 ("Conference Report"). (Emphasis supplied.)

[6] See pp. 9–12 *infra*.

[7] Two developments diminished the basis for Phase II. First, in 1979, world oil prices doubled (App. 114a, 142a). Under the NGPA, the ceiling on the incremental pricing surcharge was tied to the price of oil, the alternative fuel to natural gas. Thus, the rise in the price of oil increased the potential charges to users of natural gas to levels that might create grave problems. Second, most states used regulatory authority reserved to them by the NGPA to adopt "state-level incremental pricing" which shifted surcharges from

1980, FERC gave advance notice of its Phase II proposal to Congress, and on May 6, 1980, it gave formal notice.[8] On April 3, the Subcommittee on Energy and Commerce of the House Committee on Interstate and Foreign Commerce (respectively "House Subcommittee" and "House Committee") began hearings on the proposal. The Chairman of FERC, Charles B. Curtis, testified at the hearings accompanied by the entire Commission. After explaining why a second, expanded phase would not achieve the prime intended goal of incremental pricing, the FERC Chairman explained "[t]herefore, we have a certain lack of enthusiasm for it, if that is a fair judgment." *House Incremental Pricing Hearings, supra* note 8, at 383.

After the House Subcommittee completed hearings, it and the House Committee recommended that incremental pricing not be expanded to a second phase. In a complete report, the "committee accept[ed] the Commission's determination that incremental pricing, as embodied in this rule, is ill-suited to accomplish" the goals of bringing greater order to the natural gas market and shielding consumers from gas costs (App. 120a).[9] After debate, on May 20, 1980, the House adopted House Resolution 655, 96th Cong., 1st Sess., a resolution under section 202(c) to disapprove the Phase II proposal, by a margin of 369 to 34. The committee report and the debate focused on factors showing that expanding the program would not

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their own consumers to industries in other states and distorted the impact of incremental pricing (App. 152a).

[8] *Phase II Incremental Pricing of Natural Gas: Hearings Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 1, 202 (1980) ("*House Incremental Pricing Hearings*").

[9] The committee report relied on FERC's own analysis concerning what Chairman Curtis had called FERC's "lack of enthusiasm" for the rule. The committee's report analyzed the background and purposes of incremental pricing, App. 107a–111a, and the FERC proposal, *id.* at 112a–120a. It stressed the changed market conditions (including the doubling of oil prices) since adoption of the NGPA, *id.* at 114a–115a and the reasons, including state-level incremental pricing, *id.* at 117a–118a, that incremental pricing would not achieve the goals of incremental pricing.

achieve the law's goals.[10] Consistent with the decision of Congress in 1978 that expansion of incremental pricing should be optional, the House concluded that under current conditions the option to expand incremental pricing, thereby imposing higher energy costs on high-priority industrial gas users, should not be exercised.

After the House decision, respondents sought rehearing by FERC of the part of its order stating the expanded rule would not become effective if disapproved by Congress. On rehearing, FERC declined to rule on the constitutional issue raised by respondents. It revoked its own proposal for a second phase, noting "that we might well have very serious reservations as to the wisdom of making the Phase II rule effective" (App. 199a–200a).

Respondents petitioned the United States Court of Appeals for the District of Columbia Circuit for review. On January 29, 1982, the court of appeals declared section 202(c) unconstitutional. The court reached the question of constitutionality by finding the statutory provision for legislative review to be severable from the provision for a second phase, on the theory "that Congress would have enacted section 202 in the absence of the legislative review provision in subsection (c)" (App. 24a). In striking down the legislative review provision, the court of appeals declared that "[t]he primary basis of [its] holding is that the one-house veto violates Article I, Section 7, both by preventing the President from exercising his veto power and by permitting legislative action by only one house of Congress" (App. 37a). The court of appeals also found that legislative review "contravenes the separation of powers principle. . . ." *Id.*

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[10] *See* note 7 *supra;* 126 Cong. Rec. H3849 (daily ed. May 20, 1980) (Rep. Stockman) ("vastly changed market for alternative petroleum fuels that could not simply have been anticipated at the time"); *id.* at H3854 (Rep. Ashley) (prices of oil "have virtually doubled. . . . Consequently, any such [incremental pricing] rule risks the serious economic dislocations I have mentioned"). Several Congressmen noted that the high ceiling for incremental gas prices, which resulted from the doubling of oil prices, might cause industry relocation to exploit regional gas price disparities, see *id.* at H3848–3849 (Rep. Hillis), *id.* at H3853 (Rep. Benjamin), *id.* (Rep. Quayle).

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF THE COURT OF APPEALS THAT SECTION 202 IS UNCONSTITUTIONAL.

The court of appeals struck down section 202(c) of the NPGA on two bases. Primarily, the court held legislative review to be unconstitutional because such review "changed the law" (App. 74a) without following the procedures for enactment of new legislation. Also, the court held that legislative review violated the principle of separation of powers because the Congress had intruded into the spheres of the Executive and the Judiciary (App. 88a, 100a). On both of these grounds, the decision of the court of appeals warrants review and reversal by this Court.

1. LEGISLATIVE REVIEW DIFFERS FROM ORIGINAL ENACTMENT.

The court of appeals cited as its primary ground that legislative review violated Article I, Section 7 of the Constitution, which establishes "prerequisites to *the enactment of federal laws:* bicameral passage of the legislation, and presentation for approval or disapproval by the President" (App. 55a) (footnotes omitted and emphasis supplied). The court noted that the adoption of a legislative review resolution by a House of Congress "differs from enactment of a statute which obviously must comply with Article I, Section 7," because "a resolution of disapproval does not amend the statutory language. . . ." (App. 81a). The court also noted that the primary purpose of the Article I, Section 7, procedure for presentation to the President "was to give the President a defensive weapon against legislative intrusions" (App. 64a), but it observed that this "defensive purpose of the presidential veto was fulfilled by the President's opportunity to veto the NGPA in 1978" (App. 72a). Nevertheless, the court decided to equate legislative review with enactment of new legislation for purposes of the procedural requirements of Article I, Section 7, because it believed that legislative review "changed the law" (App. 74a).

Article I, Section 7, sets forth requirements for Congress to enact new legislation or to change prior legislation. If there is no "change" of previously enacted law, there is no need to go through the enactment process a second time; as the court of appeals implicitly recognized, the elaborate requirements of bicameral approval and presentation apply only to such change. Both the wording of Article I, Section 7, and the history that led to its adoption, show that the Framers were concerned only with the methods for enacting new legislation or changing previously enacted law.[11] As to whether legislative review pur-

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[11] The background of Article I, Section 7, shows that the Framers were only concerned with the methods for enacting new legislation. At the Constitutional Convention, Article I, Section 7, Clause 3, the Presentation Clause, originated with a proposal by James Madison. Madison feared that the Congress would follow the practice of the Pennsylvania legislature and evade the procedure for enacting new legislation by enacting "resolves" instead of bills. The "resolve" was well-recognized as a specialized type of legislation. *See* L. S. Cushing, Elements of the Law and Practice of Legislative Assemblies in the United States of America § 752, at 297 (1856) ("A resolve . . . is the form generally adopted in this country, when administrative, local, or temporary laws are to be passed.")

Framers repeatedly referred to a report by the Council of Censors in Pennsylvania in 1784 that showed how Pennsylvania's constitutional system of checks and balances had been upset. See 5 J. Elliott, Debates on the Adoption of the Federal Constitution 430 (1968 ed.) (reference by G. Morris to report just before debate on Presentation Clause); J. Madison, The Federalist No. 48, at 346, and No. 50, at 353 (Wright ed. 1974) (referring to the same report). That report described the main method by which Pennsylvania's checks and balances for enacting legislation had been upset: "by the exercise of a power assumed by the General Assembly to make laws and to alter laws, and to appropriate the lands, goods and money of the Commonwealth by RESOLVE only, which so far from being published for consideration, and deferred to the next session, is passed secretly and immediately." A Report of the Committee of the Council of Censors. . . . 15 (1784).

Accordingly, Madison proposed that the provision specifying the procedures for enacting "bills" be amended to add the phrase "or resolves." 5 J. Elliott, *supra* at 431. His proposal was "thrown into a new form" the day after he made it and was adopted as Article I, Section 7, Clause 3. *Id.* In light of the clear understanding at the time that the resolve was a type of proposed new legislation akin to the bill, the Framers' evident intent in adopting the constitutional provision was thus to constrain the methods for enacting new legislation.

suant to previously enacted law should be considered a "change" of that law, however, neither the express language of Article I, Section 7, nor the explanations of the Framers, offer guidance. Prior to the twentieth century, the only discussion of this issue at all was an opinion of the Attorney General in 1854, in which he found action by one House pursuant to previously enacted legislation to be constitutional, in marked contrast to action by one House without previously enacted legislation. 6 Op. Att'y Gen. 680, 683 (1854).

Thus, this issue is one of those Justice Jackson contemplated in observing that "[a] judge, like an executive adviser may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power. . . ." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 634 (1952) (concurring opinion). As Justice Frankfurter explained, in resolving such an issue, the courts must not "disregard the gloss which life has written" upon "the words of the Constitution," for while "[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation . . . they give meaning to the words of a text or supply them." *Id.*, 343 U.S. at 610 (concurring opinion). The historical development of legislative review shows that it has served a sound and vital function quite different from the court of appeals' assumption that legislative review was a way to "change" the law. Rather, legislative review has served traditionally as an integral part of legislation delegating broad authority. It has drawn its force and effect, not from any effort by a later Congress to "change" previously enacted law, but from the intent of the Congress enacting the original authority to limit what it is delegating; not from any effort by a later Congress at "reconsideration" of previously defined policy, but from the policy of the Congress enacting the original authority to assure that the exercise of novel or experimental authority will be subject to democratic accountability.

Legislative review developed in response to the unprecedented national problems of the Depression and World War II. Dealing with those problems required Congress to make sweeping delegations of authority of unprecedented breadth. While this

Court upheld those broad delegations,[12] it recognized, and continues to recognize, the tension between the grant of broad authority to the President or an agency, and the Framers' expectation that Congress would be the maker of national policy.[13] Congress responded to this same tension in 1939 when it delegated to the President the broad authority he sought to reorganize the Depression-spawned agencies,[14] and when it delegated the sweeping statutory authority required to prosecute World War II,[15] by subjecting the exercise of that delegated authority to legislative review. In this way, Congress coupled necessary grants of broad authority with a mechanism assuring a measure of democratic control over otherwise excessive delegations.

After a decade of familiarity with legislative review, the Truman Administration endorsed it in 1949 with an opinion of the Justice Department rejecting the theory that legislative

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[12] *See, e.g., Lichter* v. *United States*, 334 U.S. 742 (1948); *Yakus* v. *United States*, 321 U.S. 414 (1944); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940).

[13] *See Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 646 (1980) (plurality opinion) (noting danger of statutory construction that delegates sweeping authority); *id.* at 685–87 & nn. 6–7 (Rehnquist, J., concurring) (citing commentary on delegation doctrine).

[14] Congress had temporarily delegated reorganization authority with provision for legislative review, in the Economy Act of 1933, ch. 314, 47 Stat. 382, 413 (1932). After the New Deal led to a proliferation of government agencies, Congress debated renewal of reorganization authority for several years and ultimately enacted a renewal in the Reorganization Act of 1939, ch. 36, 53 Stat. 561 (1939). Just as the earlier reorganization authority had been challenged for excessive delegation, *see Isbrandtsen-Miller Co.* v. *United States*, 300 U.S. 139, 148 (1937), the issue of excessive delegation was extensively debated before passage of the 1939 Act. See D. G. Morgan, Congress and the Constitution: A Study of Responsibility 184–203 (1966).

[15] Over thirty statutes were passed during World War II delegating extensive authority over matters such as price control, subject to termination by concurrent resolution of both Houses of Congress. *See Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 542 n.7 (1954)) (price control statute); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983, 1089–90 (1975) (listing statutes).

review was equivalent to enactment of new legislation.[16] For the following quarter of a century, while the Executive opposed legislative review by Congressional *committees*, it largely accepted legislative review by the Houses of Congress as a means for balancing necessarily broad delegations of authority with democratic accountability. Legislative review was assigned that balancing function in legislation initiating, or responding to, the Truman Doctrine, the Korean War, the Middle East Crisis of 1957, and the Vietnam War,[17] as well as legislation responding to a host of novel domestic problems or concerns.[18] Congress employed legislative review for that key balancing function in pillars of government authority such as the Congressional Budget and Impoundment Control Act of 1974, the National Emergencies Act, and the War Powers Resolution.[19]

Legislative review served the same balancing function in legislation responding to the energy crisis of the 1970's. The 1973 Arab oil embargo commenced a series of national energy crises, including economic shocks from price increases and severe economic disruptions from natural gas shortages. See

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[16] Department of Justice, *Memorandum Re Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress* (S. 526 and H.R. 2361, 81st Cong., 1st Sess.), *reprinted in Reorganization Act of 1949*, S. Rep. No. 232, 81st Cong., 1st Sess. 19–20 (1949).

[17] Assistance to Greece and Turkey, ch. 81, 61 Stat. 103 (1947) (Truman Doctrine); Universal Military Training and Service Act, ch. 144, 65 Stat. 75, 80 (1951) (conscription during Korean War); Resolution to Promote Peace and Stability in the Middle East, Section 6, 22 U.S.C. 1965 (Middle East Crisis of 1957); H.R.J. Res. 1145, 88th Cong., 2d Sess., Pub. L. No. 88–408, 78 Stat. 384 (1964) (Tonkin Gulf Resolution), *repealed*, Pub. L. No. 91–672, Section 12, 84 Stat. 2053, 2055 (1971).

[18] *See, e.g.*, Regional Rail Reorganization Act of 1973, Section 208, 45 U.S.C. 718 (bankruptcy of Northeast railroads); National Aeronautics and Space Act of 1958, Pub. L. No. 85–568, Section 302, 72 Stat. 433 (1958) (space program); District of Columbia Self-Government Act, Pub. L. No. 93–198, Section 604, D.C. Code Ann. 1–207 (1981).

[19] Respectively, Pub. L. No. 93–344, Section 1013, 31 U.S.C. 1403; Pub. L. No. 94–412, Section 202, 50 U.S.C. 1622; Pub. L. No. 93–148, Section 5, 50 U.S.C. 1544.

note 2, *supra*. Congress recognized early in this period that the energy crisis again raised the recurrent "problem of finding a means by which a legislative body in a democratic republic may extend extraordinary powers for use by the Executive during times of emergency without imperiling our Constitutional balance of liberty and authority." [20] Based on its contemporary investigation of the use of emergency authority,[21] Congress was reluctant to grant President Nixon's request for unchecked emergency authority over energy use. Instead, it concluded that legislative review through the "congressional disapproval mechanism . . . provides the best opportunity for resolution of this problem." *Id.* Legislative review became the critical component for balancing a host of broad statutory delegations concerning energy rationing, contingency plans, strategic oil reserves, allocation of energy production materials, oil exports, and naval reserve production.[22] Thus, when the conference committee on the NGPA faced the need to delegate authority for the novel experiment of incremental pricing of natural gas, it had a history of legislative review provisions in enactments delegating energy authority on which to draw.

Both the legislative history of the NGPA, and the record of the 1980 House disapproval of the Phase II proposal, show that legislative review served as an integral part of the delegation of authority in the original law, rather than as a means of post-enactment "change" of that law. Congress was highly

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[20] National Energy Emergency Act of 1973, H.R. Rep. No. 763, 93d Cong., 2d Sess. 41 (1974). This bill would have delegated authority for mandatory energy conservation, rationing, and conversion of boiler facilities from natural gas and oil to coal. President Nixon vetoed the bill, but most of the authority proposed in the bill was enacted in subsequent energy legislation providing for legislative review.

[21] *See National Emergency: Constitutional Questions Concerning Emergency Powers, Hearings Before the Senate Special Comm. on the Termination of the National Emergency*, 93d Cong., 1st Sess. (1973).

[22] Naval Petroleum Reserves Production Act of 1976, 10 U.S.C. 7422(c)(2)(C) (naval reserve production); Energy Policy and Conservation Act, 15 U.S.C. 757 and 760a, 42 U.S.C. 6239 and 6261 (petroleum pricing controls and product allocation, strategic oil reserves, and rationing and contingency plans); Federal Nonnuclear Research and Development Act of 1974, 42 U.S.C. 5911 (allocation of energy production materials); Act of November 16, 1973, 30 U.S.C. 185(u) (oil exports).

reluctant to make an unlimited delegation of authority for full-scale incremental pricing. As another panel of the court of appeals noted, "[t]he incremental pricing scheme Congress adopted in the NGPA was novel and experimental, and viewed with some trepidation by many members who feared it would bring in its wake massive switching to non-gas fuels, regional dislocations of industry, and a bureaucratic orgy." *Ohio Association of Community Action Agencies* v. *FERC*, 654 F.2d 811, 820 (D.C. Cir. 1981). Thus, an integral part of the delegation by Congress of authority for incremental pricing was the two-phase procedure that made expansion of it to high-priority industrial users optional. See pp. 18–19 *infra*. Legislative review, far from being a means for changing the law, was an expression of the original concern of Congress, at the time it enacted the NGPA, about delegating unchecked authority for incremental pricing.

The House's disapproval in 1980 of the proposal to expand incremental pricing illustrates that legislative review served purposes other than "changing" the previously enacted law. The committee report recommending disapproval, the debate on disapproval, and the House vote on disapproval all showed that in 1980 the House was not reconsidering its decision eighteen months earlier to enact an optional incremental pricing program. Rather, the House responded to factors showing that exercising the option created by the 1978 law would not achieve the law's original goals. That report and debate, which drew heavily on FERC's own analysis, explored how counterproductive incremental pricing would be in light of developments since 1979. See nn. 9 and 10, *supra*. Far from undoing the law, legislative review confirmed the judgment of Congress in 1978 to make optional Phase II of the novel and experimental authority in the law.

2. LEGISLATIVE REVIEW IS CONSISTENT WITH THE FUNCTIONS OF THE BRANCHES.

As an additional ground for its decision, the court of appeals held that legislative review violated the principle of separation of powers. The court of appeals considered rulemaking to be an

"executive" function (App. 92a n.203), and deemed legislative review unconstitutional because it "may give Congress the power to control the agency's discretion in considerable detail" (App. 90a). The court concluded that "this case presents an example of extreme disruption of the normal administrative process" (App. 95a).

The court of appeals' reliance on separation of powers as an alternative ground at least has the virtue of judging the legislative review provision based on its concrete impact. In this respect, the ground of separation of powers contrasts favorably with the sweeping interpretation of Article I, Section 7, advanced by respondents in the court below. Under that sweeping interpretation, respondents would invalidate numerous legislative review provisions in the many special and sensitive contexts where Congress and the President have used them throughout the post-World War II era to accommodate this need for coordinated action.

However, section 202(c) is fully consistent with the separation of powers. To the extent that this Court has assigned rulemaking to any particular category, it has not considered it an "executive" function, as the court of appeals did. Rather, this Court repeatedly held rulemaking to be legislative in nature; agencies or even courts vested with rulemaking power are deemed to act in a "legislative" capacity. *See, e.g., Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719, 731 (1980); *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 571 (1973); *Keller* v. *Potomac Electric Co.*, 261 U.S. 428, 441 (1923).

When Congress subjected incremental price rulemaking to legislative review, it did not authorize review of another branch's "constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977). A different case would be presented by legislative review of agency action in an executive or judicial capacity, such as adjudicating particular natural gas cases, or prosecuting particular gas producers, or appointing natural gas regulatory commissioners. *Cf. Buckley* v. *Valeo*, 424 U.S. 1 (1976) (appointment power reserved as an Executive function). Here, Congress reviewed no constitutionally assigned executive or

judicial function. The impartial legal judgment of the adjudicator, and the skills of the administrator, shape the making of particular decisions and legitimize the application of rules to particular individuals. Yet, here, the matter at issue was not the application of rules, but the policy issue of whether to create major experimental general rules at all. At its heart, that decision involved the potential sacrifice of some groups' interests for the welfare of the nation as a whole. To legitimize such decisions concerning the balancing of group economic interests does not call for executive or judicial judgment, but for the participation of the polity through the democratic process of its elected representatives. It turns the separation of powers doctrine on its head to exclude the legislature from responsibility for precisely the kind of economic and social policy judgment which is legislative in nature, requiring as a matter of constitutional law that unelected and unaccountable administrators make that legislative decision.

Moreover, democratic accountability for FERC rulemaking did not "preven[t] the *Executive Branch* from accomplishing its constitutionally assigned functions," *Nixon* v. *Administrator of General Services*, *supra*, 425 U.S. at 443 (emphasis supplied), because it did not affect a matter under presidential control. In recent years, as the relation of major rulemaking to national policy has become increasingly evident, successive presidents have mandated presidential review of rulemaking by Executive Branch agencies.[23] However, natural gas pricing has not been subject to such presidential review; since 1938, natural gas price regulation has been conducted by FERC and its predecessor agency, both of which have been beyond Executive Branch control. FERC, like "[t]he Federal Trade Commission . . . cannot in any proper sense be characterized as an arm or an eye of the executive . . . and . . . [it] must be free from executive control." *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628 (1935).

For independent agencies, the elaborate rulemaking review apparatus developed by successive presidents does not provide

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[23] Executive Order 12299, 46 Fed. Reg. 13193 (1981); Executive Order 12044, 43 Fed. Reg. 12661 (1978); Executive Order 11821, 39 Fed. Reg. 41501 (1974).

any of the democratic accountability necessary to the proper exercise of major, novel and experimental rulemaking authority. Only Congress can. The Executive Branch itself recognizes that this renders legislative review of independent agency rulemaking especially appropriate. As that Branch's spokesman testified before the congressional committee studying the matter, from "the standpoint of policy this Administration has no reservations about a legislative veto applying to the select independent agencies. The President . . . has indicated a desire to consider legislative veto types of mechanisms as a policy matter over the independent agencies. He is not in favor of legislative veto over executive branch agencies, agencies under his direct supervision and control." *Regulatory Reform Legislation of 1981: Hearings Before the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. 15 (1981) (statement of James C. Miller III, Administrator for Information and Regulatory Affairs, Office of Management and Budget).[24]

Legislative review accords well with the separation of powers in other respects. Legislative review does not "control the agency's discretion in considerable detail" (App. 90a), or produce "extreme disruption of the normal administrative process" (App. 95a), or create an "[i]ntrusion into the judicial sphere" (App. 101a), as the court of appeals suggested. Rather, the process by which the incremental pricing decision was made was sound and orderly, and it respected the administrative and judicial spheres. Without control or interference from Congress, FERC employed its technical expertise to prepare the complex proposed rule showing how incremental pricing might be extended to high-priority industrial gas users. All the details of that scheme were worked out by FERC, and its execution would also have been left to FERC. FERC laid that rule before Congress, not for detailed control nor for disruptive interference, but for a single, discrete legislative judgment. In fact, at the congressional hearings on whether Phase II should go into effect, the FERC Chairman, Charles B. Curtis, accompanied by the entire Commission, testified that "I believe, and I think my

[24] The Executive took this position "notwithstanding the question of the constitutional issues or the legal issues . . . [which] should be tested out in the courts." *Id.*

colleagues share my belief that the Congress is the proper forum for making that judgment. . . ." *House Incremental Pricing Hearings, supra* note 8, at 367.

The court of appeals conjectured that if Congress had not disapproved the rule, the judiciary would have been "presented with a difficult question of how much weight, if any, to give to the implicit congressional finding. . . ." in favor of the rule (App. 101a). But the courts would have resolved that question just as this Court resolved the same question this past term regarding two other rules reviewed and not disapproved by Congress. *See North Haven Bd. of Education* v. *Bell*, 102 S. Ct. 1912, 1923–24 (1982); *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 102 S. Ct. 38, 43 (1981). In both cases this Court accorded the fact that the rule had been reviewed and not disapproved by Congress some weight, but not great weight. In neither case did this Court express any difficulty with the relationship between legislative and judicial review of the same rule, and there is no such difficulty. Legislative review provides democratic accountability of policy decisions; judicial review provides definitive judgments on legal authority. The two are perfectly compatible.

II

THE DECISION OF THE COURT OF APPEALS ON SEVERABILITY PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW.

The court of appeals granted respondents standing to challenge legislative review by severing legislative review from the provision authorizing Phase II.[25] Its decision severed legislative review by applying the novel criterion that Congress "would have" enacted Title II even without legislative review (App. 28a). The potentially sweeping effect of this criterion and its fundamental error warrant review and reversal by this Court.

In the past forty years, Congress has delegated broad powers

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[25] If legislative review were not severable, respondents could obtain no relief from their suit, and would therefore lack standing. Relief would be unobtainable because success in their challenge would eliminate all of Phase II as an inseverable unit, including the provisions which provide the benefits that they seek.

to administrators for responding to novel or intractable problems only because exercise of those broad powers was subject to legislative review. In many instances "the legislative veto has been the key to getting the very delegation of authority the executive wants." J. Sundquist, The Decline and Resurgence of Congress 356 (1981). In the particular context of energy regulation, legislative review has been the key to delegation of a host of broad powers.[26] Without addressing the severability of each such provision, the test applied by the court of appeals would allow administrators to assert that the extraordinary powers to make war, defer spending, declare emergencies,[27] and make national energy policy should be severed from a legislative review provision which was the key to their enactment, and which furnishes the democratic check on their exercise—merely on speculation that Congress "would have" delegated such broad powers without legislative review.

Title II's structure and legislative background show that Congress never intended that the authority for expansion of incremental pricing be exercisable severed from legislative review. Title II bifurcates incremental pricing into two phases. The first phase under section 201 regulates boiler fuel use. The second phase under section 202 expands incremental pricing to other, high-priority industrial uses. Aside from a six-month interval between their commencements, the key difference between the two phases is that that the second phase was to be effectuated *only* as provided in the legislative review provision. *Compare* section 201 *with* section 202. To sever legislative review does not merely alter the statute; it obliterates Title II's essential structure and logic.

The legislative background shows Congress had strong reasons to devise a compromise for Title II with that structure.

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[26] These include the powers to trigger rationing and other contingency plans responsive to energy shortages, section 201 of the Energy Policy and Conservation Act, 42 U.S.C. 6261; the power to implement a plan for a strategic petroleum reserve, section 159 of that Act, 42 U.S.C. 6239; the power to raise prices for regulated oil beyond the fixed ceilings, section 401, 15 U.S.C. 757; and the power to assume exclusive authority to make purchases of oil from foreign countries, section 456, 15 U.S.C. 760b.

[27] See 50 U.S.C. 1544; 31 U.S.C. 1403; 50 U.S.C. 1622.

In several laws responding to the energy crisis, Congress mandated strict restraints for low-priority boiler fuel uses of natural gas, but not for high-priority industrial uses.[28] It continued the same distinction when considering incremental pricing, finding that boiler fuel use was a "wasteful" use of natural gas,[29] in contrast to high-priority uses for which there are often no practical substitutes for natural gas. The conference committee was required to deal with the sharp difference between the two Houses regarding incremental pricing,[30] and the general congressional "trepidation" about such pricing, *Ohio Association of Community Action Agencies* v. *FERC*, 654 F.2d 811, 820 (D.C. Cir. 1981). It naturally structured its compromise along the long-standing distinction between low- and high-priority industrial uses.

Thus, the court of appeals obliterated the structure which had resolved major congressional differences and doubts, and by extinguishing that structure, the court eliminated the statute's adherence to a consistent congressional policy regarding natural gas priorities. The court's chief justification for doing so was that, regardless of what Congress actually adopted, had Congress been unable to adopt a legislative review provision it "would have enacted" a program for two

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[28] *See* 15 U.S.C. 792(a); 42 U.S.C. 8312 (Supp. IV 1980).

[29] See note 4 *supra*.

[30] The House and Senate differed sharply on altering a forty-year-old policy against federal intrusion into local price regulation. A key element of incremental pricing which distinguishes it from the previous federal regulation of natural gas prices is that the federal government dictates a surcharge to be charged by the local distributor to the ultimate end user. For the previous forty years of regulation under the Natural Gas Act, the determination of charges at the local level had been reserved exclusively to state regulators, in "an unequivocal recognition of the vital interests of the states and their people, consumers and industry alike, in the regulation of rates and service." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 521 (1947). The House provision, section 410 of H.R. 8444, 95th Cong., 1st Sess. (1977), provided for passthrough of incremental pricing charges to local users, while the Senate provision, section 29 of H.R. 5289, 95th Cong., 1st Sess. (1977), did not. See Conference Report, *supra* note 5, at 94, 1978 U.S. Code Cong. & Admin. News at 9011 ("The requirements of the Senate passed legislation applied only to interstate pipelines and not to intrastate pipelines or to local distribution companies.")

mandatory phases (App. 24a). This sheer speculation about what Congress "would have" done lacks support in this Court's precedents, which consistently test severability by examining the actual intention of the enacting Congress in adopting the particular program it did.[31] Instead of examining what Congress actually intended, the court of appeals departed from the judicial function and assumed the legislative one of choosing freely among the universe of available legislative options. This Court should conclude that legislative review is not severable from this particular statutory scheme. Since respondents therefore lack standing, the court of appeals should have dismissed the petitions for review without adjudicating the merits of the constitutional question.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[31] *See, e.g., Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973) (provisions cannot be severed when that would "create a program quite different from the one the legislature actually adopted").

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